Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

UNION ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a tax imposed by the United States on the ownership of a "particular kind of personal property" is a "direct tax" which, without apportionment among the States, is unlawful because in violation of Article I, Section 2, Clause 3 and Article I, Section 9, Clause 4 of the Constitution.

STATEMENT UNDER RULE 14.1 AND RULE 29.6

All parties to this proceeding are shown in the caption of the case. Petitioner is a wholly-owned subsidiary of Ameren Corp. No publicly held company owns ten percent or more of the stock of Ameren Corp.

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PETITION FOR A WRIT OF CERTIORARI

Union Electric Company respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 363 F.3d 1292. The opinion of the United States Court of Federal Claims (App., *infra*, 26a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the Constitution of the United States provides, in relevant part (U.S. Const. Art. I, § 2, cl. 3):

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers * * * .

2. Article I, Section 8, Clause 1 of the Constitution of the United States provides (U.S.Const. Art. I, § 8, cl. 1):

> Duties, Imposts and Excises shall be uniform throughout the United States.

3. Article I, Section 9, Clause 4 of the Constitution of the United States provides (U.S. Const. Art. I, § 9, cl. 4):

> No Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken.

4. The relevant provisions of Section 1101 of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2951, codified at 42 U.S.C. 2297g and 42 U.S.C. 2297g-1, are set forth in the Appendix, *infra*, at 36a-39a.

STATEMENT

On several occasions and in a variety of circumstances, this Court has held that the "direct tax" clauses of the Constitution proscribe the imposition of a federal property tax by the United States. In this case, however, the Federal Circuit leaped over these constitutional restrictions to sustain a federal tax imposed on property owned by domestic utility companies. In concluding that a federal property tax on the ownership of "particular items of property" is not a "direct tax" proscribed by the Constitution (U.S. Const. Art. I, § 9, cl. 4), the court of appeals abandoned the clearly applicable precedent of this Court and dramatically expanded the federal taxing power. Review by this Court is warranted by this serious departure from the decisions of this Court and by the practical importance of the taxes that the decision below authorizes.

1. *Background of the Enactment of the Tax.* The tax involved in this case was enacted by Congress as part of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2953 (EPACT). That statute was adopted for the purpose of discontinuing the involvement of the federal government in the atomic energy business.

a. The United States began constructing and operating uranium enrichment plants during World War II. These plants process uranium materials to enhance the portion of fissionable isotopes that they contain. They were originally operated exclusively for national defense purposes. Prior to 1970, more than 95% of the enriched uranium produced by the government was used for federal weapons programs.[1]

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[1] The facts relating to the government's uranium enrichment activities prior to 1992 are set forth in *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1330-1336 (Fed. Cir. 2001) (en banc), cert. denied, 531

Beginning in 1969, however, the United States government authorized the sale of enriched uranium to public utilities for use in nuclear reactors that generate electrical power. These sales were made by the government under fixed price contracts, with the price based on the degree by which the uranium had been enriched by the government's processing. The degree of enrichment was measured by a term known as a "separative work unit" (SWU): the higher the degree of enrichment, the greater the number of SWU's contained in the processed materials.[2]

b. The United States government dominated the uranium enrichment market until the late 1970's. By 1990, however, the government's share of that market dwindled due to price competition from foreign producers. At the same time, the Department of Energy (which then operated the government's enrichment facilities) publicly disclosed that severe pollution problems had occurred during the government's operation of its enrichment facilities.[3]

In 1992, these considerations led Congress to enact legislation with two principal objectives. First, Congress decided to privatize the government's uranium enrichment business by selling its plants to private investors. To facilitate that sale, and to maximize the price realized by the

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U.S. 1096 (2002). That case, which addressed different challenges to the EPACT tax, is discussed at page 8, *infra*. In the present case, the court of appeals adopted and incorporated by reference the recitation of facts set forth in its prior opinion in *Commonwealth Edison*. App., *infra*, 2a-4a.

[2] *Commonwealth Edison*, 271 F.3d at 1331.

[3] In *Yankee Atomic Electric Co.* v. *United States*, 112 F.3d 1569, 1572 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998), the court stated that the Department of Energy did not recognize these pollution problems "until the 1980's."

government, Congress specified that the United States would retain all liabilities for the past pollution and contamination resulting from the operation of these facilities.[4]

Second, to raise money to clean up the pollution that the government had created at its facilities, Congress established a "decontamination and decommissioning" fund. 42 U.S.C. 2297g. This Fund was given two sources of revenue. First, Congress undertook to contribute future appropriations of up to $368 million per year (adjusted for inflation after 1992). See 42 U.S.C. 2297g-1(a), (d). Second, Congress imposed an annual tax of $150 million per year (adjusted for inflation after 1992) that was allocated among all of the domestic utilities that, on October 24, 1992 (the date of enactment of the legislation), owned enriched uranium materials that had been produced by the government prior to that date. 42 U.S.C. 2297g-1. This case concerns the constitutionality of that tax.

2. *How the Tax Provision Operates.* The tax involved in this case is known as the EPACT tax. The amount of the tax is $150 million per year (adjusted for inflation), and it

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[4] In the EPACT legislation, Congress established the United States Enrichment Corporation, which was chartered to take over the facilities and operate them on a "profitable and efficient basis" in order to "maximize the long-term value of the Corporation to the Treasury," and thereafter to sell the enterprise to private investors. 42 U.S.C. 2297c-2(d), 2297c-5. This plan was finalized in 1998, when the United States Enrichment Corporation was sold by the government to private investors for $1.4 billion. J.K. Glassman, *The Inside Scoop*, Washington Post (Aug. 30, 1998), at H1. Without the government's assumption of the pollution remediation costs, the government obviously would not have realized the amount that it obtained on the sale of the facilities. And, as described in the text, the government has sought to assign an even *greater* amount of its own decontamination costs -- more than $2 billion -- to public utilities under the tax challenged in this case.

continues each year through 2007 unless, prior to that date, a total tax in excess of $2.25 billion (adjusted for inflation) has already been collected. 42 U.S.C. 2297g-1(e). Each utility pays a specified fraction of each year's total assessment under a formula set forth in the statute. 42 U.S.C. 2297g-1(c). The numerator of that fraction is the amount of the enriched uranium (measured in SWUs) previously purchased by that utility from the government (or from another party who had purchased the material from the government) that the utility had *not* resold as of October 24, 1992.[5] The denominator of the fraction is the total amount of enriched uranium (measured in SWUs) that the government produced for all commercial and defense purposes prior to that same date. *Ibid.*

Under the plain text of this statute, the EPACT tax is thus imposed simply and directly on each utility based on the amount of enriched uranium that it owned on the assessment date of October 24, 1992. See note 5, *supra*. The tax is, in short, "imposed on property because of its ownership" (*Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 150 (1911)) on the assessment date.

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[5] At first blush, the statute appears to provide that the tax is to be paid by each utility only on the amount of enriched uranium it "purchased from the Department of Energy * * * before October 24, 1992." 42 U.S.C. 2297g-1(c). That general statement is then modified, however, by two further provisions. First, the statute specifies that a utility "shall be considered to have purchased" the enriched uranium from the Department if it was "produced by the Department, but purchased by the utility from another source;" second, the statute provides that a utility "shall not be considered to have purchased" the enriched uranium from the Department if it "was purchased by the utility, but sold to another" utility prior to October 24, 1992. 42 U.S.C. 2297g-1(c)(1), (2). The annual EPACT tax is thus imposed directly on each utility based on the amount of enriched uranium that each utility owned on the assessment date of October 24, 1992.

3. *Proceedings in this Case.* Petitioner Union Electric Company operates electricity-generating facilities and provides commercial and residential electrical service in Missouri and other States. As of October 24, 1992, petitioner owned enriched uranium purchased from the federal government. Petitioner was therefore subject to the EPACT tax on all of the enriched uranium that it owned on that date. 42 U.S.C. 2297g-1; see note 5, *supra*. During the period from 1992 to 2002, petitioner paid more than $14 million in ten separate annual assessments of that tax. App., *infra*, 4a.

In 1996, petitioner commenced this action to challenge the constitutionality of the EPACT tax in the Court of Federal Claims. Proceedings were stayed, however, while other cases presenting separate challenges to the tax were first addressed. App., *infra*, 4a.

4. *Other Challenges to the EPACT Tax.* a. In the first of these separate cases, the Federal Circuit addressed whether the EPACT assessments breached the fixed price contracts under which the government had sold the enriched uranium materials, by belatedly adding an additional charge or "fee" payable to the United States for precisely the same enriched materials. *Yankee Atomic Electric Co.*, 112 F.3d at 1576. The Federal Circuit concluded that the EPACT assessments did not breach the fixed price contracts because they were not imposed as additional "fees" on "only those utility companies that previously contracted with the Government." *Ibid.* Instead, the court held that the assessments were imposed as a "general tax" because they applied to any utility that, on October 24, 1992, owned uranium that had been enriched by the government *even if* that uranium had been purchased from a third-party rather than from the government directly. *Ibid.* The court stated that the use of this "general tax" to fund the correction of the "societal problem" created by the

government's pollution at its plants was a valid "general exercise of Congress's taxing power * * * rather than an act that retroactively increases the price charged to contracting parties." *Id.* at 1577.[6]

b. In the second of these prior cases, the Federal Circuit addressed whether the "general tax" thus imposed by EPACT was impermissibly retroactive. The court concluded that, even though the statute imposes assessments that apply retroactively to materials that had been purchased as many as 20 years prior to imposition of the tax, such an extraordinarily retroactive assessment does not violate due process because its "retroactive application * * * rationally furthers the legitimate legislative objective" of funding the remediation of the pollution created by the government at its uranium facilities. *Commonwealth Edison Co.*, 271 F.3d at 1330.[7]

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[6] In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), the Court held that an unconstitutional tax on exports could not be imposed to fund harbor maintenance activities by the United States and, in doing so, rejected the government's argument that the charges at issue in that case were a permissible "fee" on the use of harbors. *Id.* at 369-370. In the litigation involving the EPACT tax, by contrast, the United States has affirmatively maintained that the EPACT assessment is *not* a retroactive "fee" for enhancement services (and therefore does not violate the contract rights of the purchasers of enriched uranium) and instead contends that the tax is "a general exercise of Congress's taxing power." *Yankee Atomic Electric Co.*, 112 F.3d at 1577; see App., *infra*, 7a-8a.

[7] In a third prior case, a panel of the Federal Circuit noted that the en banc decision in *Commonwealth Edison* "binds this panel, and requires us to reject the utilities' taking and due process arguments." *Maine Yankee Atomic Power Co.* v. *United States*, 271 F.3d 1357, 1359 (Fed. Cir. 2001), cert. denied, 535 U.S. 1095 (2002). In a concurring opinion authored by Judge Friedman, however, two members of the *Maine Yankee* panel recorded their disagreement with the reasoning and conclusion of the en banc court in *Commonwealth Edison* and concluded that the "severe" and "wholly retroactive" nature of the EPACT "denies [the utilities] due process" under the decisions of this Court. *Id.* at 1360, 1363.

5. *Decision of the Courts Below in this Case.* a. After the proceedings in these prior cases were concluded, the stay of proceedings in the present case was lifted. The Court of Federal Claims then addressed petitioner's claim that the "general tax" enacted by EPACT was an impermissible "direct tax" in violation of Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4 of the Constitution. Petitioner contended that the EPACT tax was an impermissible "direct tax" because it was imposed by Congress (without apportionment among the States) directly on the ownership of property (government-enriched uranium) on the assessment date of October 24, 1992.

The Court of Federal Claims dismissed this claim without reaching its merits. The court reasoned that, although "a Direct Tax Clause challenge should be heard in an appropriate case," the court was bound in this case by the broad statement of the Federal Circuit in *Commonwealth Edison* that the EPACT tax does not violate due process and "is otherwise constitutional." App., *infra*, 34a (quoting 271 F.3d at 1357).

b. On appeal, the Federal Circuit rejected the conclusion of the Court of Federal Claims that the "direct tax" issue was foreclosed by any prior decision. The court of appeals emphasized that no prior decision had "explicitly addressed and decided" that issue, and that it therefore properly remained open for consideration. App., *infra*, 9a. The court further stated that, since the effect of the "direct tax" clause of the Constitution is a "purely legal" issue that "require[s] no fact finding by the Court of Federal Claims," it was "appropriate to decide the merits without remand." *Ibid.*

Reaching the merits, the court of appeals rejected petitioner's claims. The court stated that, "[a]lthough our

prior case law has definitively established that the EPACT special assessments are properly characterized as taxes, *Commonwealth Edison*, 271 F.3d at 1340, *Yankee Atomic*, 112 F.3d at 1575, we conclude that the EPACT tax is not a form of direct tax. Rather, the EPACT tax is an excise tax." App., *infra*, 9a.

The court noted that, in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), this Court had concluded that a "direct" federal tax could not be imposed (without apportionment among the States) on the ownership of real or personal property. The court of appeals interpreted *Pollock*, however, to stand for the proposition "that the only impermissible direct tax on personal property is a general tax on broad classes of personal property." App., *infra*, 18a. The court stated that *Pollock*, and the numerous cases that have relied on it, permit a federal tax that is "levied upon only one particular kind of personal property, [like] government-enriched uranium." *Id.* at 19a. The court therefore held that the EPACT assessment was "not a direct tax." *Ibid.*

The court stated that the EPACT assessment is instead an "excise," which is treated differently than a "direct tax" under the Constitution. Unlike a "direct tax," which must be apportioned among the States to be valid, an "excise" need only be "uniform throughout the United States." App., *infra*, 19a (quoting U.S. Const. Art. I, § 8, cl. 1). The court concluded that the EPACT tax should be regarded as an "excise" for two reasons: (i) because it "taxes consumables" and (ii) because it is "imposed on the acquisition, ownership or use" of personal property. App., *infra*, 20a-23a.

REASONS FOR GRANTING THE PETITION

The decision of the Federal Circuit tramples over an express restriction on the federal taxing power that is set forth *twice* in the Constitution. Article I, Section 2, Clause 3 and Article I, Section 9, Clause 4 of the Constitution *both* prohibit the imposition of a "direct" federal tax without apportionment of that tax among the States. This Court has repeatedly held that a federal property tax -- a tax on real or personal property "imposed by reason of ownership" -- is a "direct tax" that is proscribed by the Constitution. *Eisner* v. *Macomber*, 252 U.S. 189, 205 (1920). See, *e.g.*, *Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945) ("a direct tax * * * falls upon the owner merely because he is the owner"); *Bromley* v. *McCaughn*, 280 U.S. 124, 137 (1929) (same).

In the present case, however, the Federal Circuit ignored these decisions in holding that a tax imposed on the ownership of any "particular kind" of property should be treated as a permissible "excise" and *not* as a proscribed direct tax (App., *infra*, 19a). That decision of the Federal Circuit conflicts not only with the decisions of this Court, but also with the uniform holdings of the several circuits that have properly followed this Court's rulings. See, *e.g.*, *Simmons* v. *United States*, 308 F.2d 160, 166 (4th Cir. 1962) ("[a] direct tax is a tax on real or personal property, imposed solely by reason of its being owned by the taxpayer"); *American Nat'l Ins. Co.* v. *Commissioner*, 91 F.2d 705, 707 (5th Cir. 1937) (same).

This Court has long emphasized that the constitutional restraints on the federal taxing power are to be strictly enforced. As the Court recently explained in *United States* v. *IBM Corp.*, 517 U.S. 843 (1996), the restraints on the federal taxing powers were adopted to protect State sovereignty and "policy arguments" about the modern exigency of these

constitutional restrictions cannot supplant or displace their clear prohibitive text. *Id.* at 861. Review by this Court is warranted in this case by the failure of the court below to follow established constitutional precedents and by the high importance of the constitutional principles that the decision of the Federal Circuit has discarded. In light of the special role of the Federal Circuit in the adjudication of monetary claims against the United States, such review is also warranted by the vast sums of the unprecedented direct property taxes imposed by the EPACT assessments.

1. *A "Direct Tax" Includes A Tax Imposed On The Ownership Of Real Or Personal Property.* a. In *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. at 617-618, this Court held that a federal tax falls within the proscription of the "direct tax" clauses of the Constitution if it is imposed on either real or personal property by reason of ownership.[8] See *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. 1, 17-19 (1916) (a federal tax is "direct" if it applies either to real or "personal property because of its ownership"). In reaching that decision, the Court relied on the clear textual distinctions in the Constitution that "divide[] Federal taxation into two great classes, the class of direct taxes, and the class of duties, imposts, and excises; and prescribe[] two rules which qualified the grant of power as to each class." 158 U.S. at 617-618. Under Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4 of the Constitution, the "power to lay direct taxes" is limited to taxes that are "apportioned among the several States in proportion to their representation in the popular branch of Congress" and any effort to "lay direct

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[8] The Court in *Pollock* rejected the argument that a "direct tax" includes only a capitation or head tax on individuals and a tax on real property. The Court stated that the Constitution "forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power." 158 U.S. at 628.

taxes without apportionment was forbidden." 158 U.S. at 618. By contrast, under Article I, Section 8, Clause 1 of the Constitution, "[t]he power to lay duties, imposts and excises" is subject only to the requirement that "the imposition must be uniform throughout the United States." *Ibid.*

Giving these terms "in the Constitution * * * their natural and obvious sense," the Court held in *Pollock* that a tax is "direct" if it is levied "directly on the individual" or on his property. 158 U.S. at 619-621. By contrast, taxes that are "indirect" encompass duties "imposed on the importation, exportation or consumption of goods" and imposts and excises "levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities." *Id.* at 622.[9]

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[9] The *Pollock* case addressed the constitutionality of a federal income tax enacted before the adoption of the Sixteenth Amendment. The Court held in *Pollock* that the application of an income tax to earnings from real estate or invested capital was a proscribed "direct tax" on the ownership of such property because the constitutional proscription of a direct "tax on real and personal property" applies "equally * * * to the revenue therefrom." 158 U.S. at 630. The Court concluded in *Pollock* that, although the portions of the tax that reached income from wages or from the conduct of a trade or business were a permissible "excise" on business transactions, the tax, as a whole, was to be stricken because it was "invalid as to the greater part" of its intended scope. 158 U.S. at 635-637.

More than a decade after *Pollock* was decided, the Sixteenth Amendment was adopted to authorize Congress to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the Several States, and without regard to any census or enumeration." U.S. Const. Amdt. XVI. That Amendment did not disturb the conclusion in *Pollock* that the "direct tax" clauses restrict the imposition of federal taxes on real and "personal property because of its ownership." *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. at 17-19. Instead, the Court has stated that the Amendment only altered the conclusion that "a direct tax on the income" is to be treated as if were "a direct tax on the source itself." *Id.* at 19. See *Eisner* v. *Macomber*, 252 U.S. at 192.

In a lengthy series of decisions that follow *Pollock* and apply its reasoning, the Court has reiterated in numerous settings that a permissible "excise" is an indirect tax imposed on a sale or other transaction or transfer involving property, but a proscribed "direct tax" is a tax that *"falls upon the owner merely because he is owner."* *Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945) (emphasis added); *Bromley* v. *McCaughn*, 280 U.S. at 137.[10] For example, in *Eisner* v. *Macomber*, 252 U.S. at 219, the Court held that a federal tax imposed on a "stock dividend" was an impermissible "direct tax" because it was "imposed by reason of ownership" and "Congress could not impose such [property] taxes without apportioning them among the States." *Id.* at 205.[11] Similarly,

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[10] In *Bromley* and *Pollock*, the Court distinguished the case of *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), on which the court of appeals incorrectly relied in this case (App., *infra*, 11a-12a). In *Hylton*, the Court sustained a federal tax that had been imposed on carriages used for "the conveying of passengers." Act of June 5, 1794, c. 45, 1 Stat. 373. Madison and Hamilton expressed disagreement over whether that tax should have been regarded as a "direct" tax for which apportionment was required. See *Pollock*, 158 U.S. at 623-625. Each of the Justices wrote separately in *Hylton* and this Court subsequently described the case as having been "badly reported." *Id.* at 626. In *Pollock*, the Court concluded that the statute involved in *Hylton* was merely an example of an "excise, and, therefore, an indirect tax" because it was imposed on the use of carriages for the conveyance of passengers. *Id.* at 627. In *Bromley* v. *McCaughn*, 280 U.S. at 136, and again in *Fernandez* v. *Wiener*, 326 U.S. at 353, this Court made clear that the *Hylton* case involved an "excise," rather than a "direct tax," because it was imposed on "the use" of property rather than on the mere "ownership of property." *Fernandez* v. *Wiener*, 326 U.S. at 353. The court of appeals thus clearly erred in relying on *Hylton* in this case.

[11] In *Eisner* v. *Macomber*, 252 U.S. at 208-215, the Court held that a stock dividend does not represent "income" within the meaning of the Sixteenth Amendment because it represents merely a reallocation of the capital represented by the original shares. Because the stock dividend was not "income," the direct tax imposed on the ownership of those shares was unconstitutional. *Ibid.* Congress has respected the holding in *Eisner* by

the Court stated in *Helvering* v. *Independent Life Ins. Co.*, 292 U.S. 371 (1934), that a federal tax imposed on the rental value of a "building occupied by the owner" could not be sustained, "for that would be to lay a direct tax" on property merely by reason of its ownership. *Id.* at 378-379 (citing, *e.g.*, *Willcuts* v. *Bunn*, 282 U.S. 216, 227 (1930); *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 294 (1921)).

In short, a "direct" tax "is not a tax upon a transfer or other taxable event but is, instead, a tax upon property -- which Congress cannot exact without apportionment." *United States* v. *Manufacturers National Bank*, 363 U.S. 194, 197-198 (1960). An "excise" tax, by contrast, is a tax on a "transfer" or other transaction involving property, such as a sales or use tax or a tax imposed on the transfer of property by inheritance or gift. *Id.* at 198-199. An "excise" is "imposed upon the exercise of some of the numerous rights of property," which "is clearly distinguishable from *a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property.*" *Fernandez* v. *Wiener*, 326 U.S. at 362 (emphasis added).[12] See *Billings* v. *United*

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excepting proportionate stock dividends from the definition of "gross income" in the Internal Revenue Code. 26 U.S.C. 305(a), 305(b)(2). See *Helvering* v. *Griffiths*, 318 U.S. 371, 392 (1943).

[12] An excise may also be imposed on the gross receipts of an enterprise for the privilege of "carrying on or doing * * * business" in a particular form. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 147 (1911). Because such an excise tax "does not impose direct taxation upon property solely because of its ownership," it does not violate the "direct tax" clauses of the Constitution. *Id.* at 150 (emphasis added):

> The Pollock Case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the prescribed capacity, and this is made the occasion for the tax * * * . *The difference between the acts is not*

States, 232 U.S. 261, 280 (1914) (an "excise" may be imposed on "the use" of a yacht even though imposition of a "direct tax" on "mere ownership" of the same property is proscribed by the Constitution).

b. The distinctions that this Court has carefully described between permissible excises and proscribed "direct" federal property taxes have been consistently observed by the other courts of appeals. For example, in *Simmons* v. *United States*, 308 F.2d 160 (4th Cir. 1962), the court held that "[a] direct tax is a tax on real or personal property, imposed solely by reason of its being owned by the taxpayer" but that an excise imposed "upon the use of property or upon its transfer, has been considered an indirect tax, not subject to the requirement of apportionment." *Id.* at 166 (footnotes omitted). Applying that test, the court in *Simmons* upheld the validity of a federal tax on the receipt of a prize in a fishing derby, because that tax was imposed on the receipt or transfer of money and was not a direct federal tax imposed on accumulated wealth or other "property" solely "upon its ownership." *Ibid.* See also *Schenley Distillers, Inc.* v. *United States*, 255 F.2d 334, 337 (3d Cir. 1958) ("a permissible type of excise" must be levied "on more than the bare ownership of property"); *Kohl* v. *United States*, 226 F.2d 381, 384 (7th Cir. 1955) ("[a] tax imposed on property * * * only by reason of its ownership is direct * * * whereas indirect taxes are levied upon the happening of an event such as an exchange or transmission of property") (citing cases).

Indeed, prior to the decision in this case, these propositions were regarded as so well established that, in *Richardson* v. *United States*, 294 F.2d 593 (6th Cir. 1961), it was "of course,

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merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.

conceded by the Government" that it could not impose "a tax on principal" amounts of promissory notes, for such a direct tax on property would be invalid under "well settled principles." *Id.* at 596. "It is also recognized that if the tax is actually one on principal," labeling it as an excise or some other indirect tax "will not avoid the constitutional limitation." *Ibid.*

2. *The Decision Of The Federal Circuit In This Case Conflicts With The Decisions Of This Court And The Other Courts of Appeals.* The Federal Circuit radically departed from this precedent in this case. The court initially acknowledged that the Constitution proscribes "direct" federal taxes on real and personal property. App., *infra*, 10a. The court erred, however, in stating that the decisions of this Court indicate that the constitutional proscription of "direct" federal property taxes is inapplicable when the tax is imposed only on one "particular kind of personal property, government-enriched uranium" (*id.* at 19a).

a. In numerous contexts, this Court and the other courts of appeals have consistently applied the proscriptions of the "direct tax" clauses to taxes imposed on one "particular kind of property" or another. For example, in *Eisner* v. *Macomber*, 252 U.S. at 219, this Court struck a "direct tax" imposed solely on a stock dividend; in *Helvering* v. *Independent Life Ins. Co.*, 292 U.S. at 378-379, the Court held that a tax imposed "on the part of the building occupied by the owner or upon the rental value of that space" would be an impermissible "direct tax;" and in *Billings* v. *United States*, 232 U.S. at 280, the Court stated that, while a "direct tax" could *not* be imposed on "mere ownership" of a yacht. an excise tax could be imposed on the "use" of that property by the owner or charter party. The ruling of the court below that a tax is not a "direct" tax if it is imposed on the ownership of

only one "particular kind" of property plainly conflicts with these decisions. See also cases cited at pages 14-17, *supra*.

b. The court below clearly erred in suggesting that in *Pollock* the Court adopted the argument pressed by Alexander Hamilton as counsel in *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), that the direct tax clauses proscribe only a general property tax and do not proscribe a tax on the ownership of "particular items" of property. App., *infra*, 16a-17a. The Court in *Pollock* expressly distinguished *Hylton* as a case involving "an excise, and, therefore, an indirect tax" on the *use* of carriages rather than a direct tax imposed on the *ownership* of that property. 158 U.S. at 627. See *Bromley* v. *McCaughn*, 280 U.S. at 136 ("a tax imposed upon a particular use of property * * * is an excise which need not be apportioned") (citing *Hylton* v. *United States*, *supra*); *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. at 17-19; note 10, *supra*.

Moreover, in *Pollock*, the Court noted that, while the views of Hamilton conflicted with the views of Madison (as well as those of other participants in the constitutional debates), *even under Hamilton's view*, a "direct tax" includes a tax on the "whole property of individuals, or on their whole real or personal estate." 158 U.S. at 625.[13] Recognizing that

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[13] Recent scholarship has comprehensively described the separate views of the Founders concerning the direct tax clauses. Those separate views generally reflect individual perspectives rather than collegial conclusions. See, *e.g.*, E. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional*, 97 Colum. L. Rev. 2334, 2377-2389 (1997); C. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 Wm. & Mary Bill of Rts J. 1, 12-24 (1998). The authors of these articles conclude that the Founders viewed the term "direct tax" broadly, and Johnson expresses the view that the term was intended by the Founders to apply to all taxes except customs duties (although he advocates a narrower construction). C. Johnson, *supra*, 7 Wm. & Mary Bill of Rts J. at 1. See also E. Jensen, *supra*, at 2338.

Hamilton's views as counsel in *Hylton* "must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject," the Court simply noted that, in light of the breadth of the income tax that was at issue in *Pollock*, the views of Hamilton were in any event not inconsistent with its decision in that case. *Ibid.*

Since *Pollock*, neither this Court nor any other court has adopted (or even referred to) the views espoused by Hamilton as an "advocate" in the *Hylton* case. Instead, as noted above, courts have consistently and properly applied the "direct tax" clauses to proscribe taxes imposed on the ownership of quite discrete "particular kinds of personal property." By attempting to resuscitate the discarded Hamiltonian view, the contrary determination of the Federal Circuit in this case directly conflicts with this large body of precedent.

c. The narrow understanding of the "direct tax" clauses adopted by the Federal Circuit also has no support in logic. If it were true (as the court of appeals asserts) that the Constitution proscribes an unapportioned federal property tax on the "whole" of one's property but does not proscribe such a tax imposed "upon only one particular kind" of property (App., *infra*, 16a, 19a), the constitutional proscription would be unenforceable. Through the simple guise of enacting a multiple set of individual federal property taxes to reach the desired accumulation of property subject to tax, the restrictions of the "direct tax" clauses would be avoided by the Federal Circuit decision.

Such a strange and ineffective rule has no basis in the text or history of the "direct tax" clauses. Instead, as the Court emphasized in *Pollock*, the "direct tax" clauses are part of the "complex system of government, * * * sagaciously framed to secure and perpetuate 'an indestructible Union, composed of

indestructible States.'" 158 U.S. at 617. The court explained that (*id.* at 620) (emphasis added):

> The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. *The States*, respectively, possessed plenary powers of taxation. They *could tax the property of their citizens in such manner and to such extent as they saw fit* * * *. *They retained the power of direct taxation*, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power [to the federal government] * * *. *The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property*, while *they expected that those of the Federal government would be for the most part met by indirect taxes*. And, in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, * * * should not be so exercised unfairly and discriminatingly, as to particular States or otherwise, * * * the qualified grant was made.

Indeed, as the Court noted in *Pollock*, the constitutional clauses that limit "direct" federal taxation of property "merely because of ownership" were "deemed so important" that they are "enforced by two provisions, one affirmative and one negative." 158 U.S. at 627-628. By permitting such facile avoidance of the proscriptions of these clauses in this case, the decision of the court of appeals plainly fails to comply with the direction of this Court that the "direct tax" clauses be "taken in their obvious sense" and given "a reasonable construction." *Id.* at 618.

d. The court of appeals particularly erred in asserting that the decisions issued by this Court after *Pollock* "repeatedly

sustained unapportioned taxes on particular items of personal property that fell short of general taxes on the whole of one's property." App., *infra*, 18a. That assertion is flatly wrong. Each of the cases cited by the court of appeals in fact concluded that, while a direct federal tax may *not* be imposed on the ownership of a particular type of property, an excise tax may properly be imposed on a "transaction" or "transfer" involving such property.

For example, in *Fernandez* v. *Wiener*, 326 U.S. at 361-362 (cited by the court of appeals at App., *infra*, 18a), this Court held that the federal estate tax is an "excise tax" based on the transfer of "some of the incidents of property" at death, which "is clearly distinguishable from a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property." Exactly that same distinction between permissible excises and proscribed direct taxes is made in *each* of the decisions of this Court on which the court of appeals erroneously relied in this case.[14] See, *e.g.*, *Bromley* v. *McCaughn*, 280 U.S. at 138 (federal gift tax is an excise tax on the transfer of property rather than a proscribed "direct tax" that "falls upon the owner merely because he is the owner, regardless of the use or disposition made of his property"); *N.Y. Trust Co.* v. *Eisner*, 256 U.S. 345 (1921) (federal estate tax is an excise on the transfer of property at death); *Billings* v. *United States*, 232 U.S. at 279 (tax on "the

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[14] The "persistence of this distinction and the justification for it rest upon the historic fact that [excise] taxes * * * were not understood to be direct taxes when the Constitution was adopted." *Bromley* v. *McCaughn*, 280 U.S. at 137. This distinction is also made necessary by the separate treatment provided to these different taxes in Article I, Section 8, Clause 1 (which requires that all duties, imposts and excises be at uniform rates) and Article I, Section 2, Clause 3 and Article I, Section 9, Clause 4 (which require that all direct taxes instead be apportioned among the States according to population). See *Pollock*, 158 U.S. at 618; *Simmons* v. *United States*, 308 F.2d at 167.

use" of a yacht is an excise and not a direct tax on its ownership); *Spreckles Sugar Ref. Co.* v. *McClain*, 192 U.S. 397 (1904) (excise tax on manufacture of goods is on the privilege of conducting business). None of the cases cited by the court of appeals even arguably provides any support for its assertion that, following *Pollock*, this Court approved direct taxes "on particular items of personal property" (App., *infra*, 18a).

e. In the face of this clear precedent, the court of appeals also plainly erred in stating that the EPACT tax on the ownership of "government-enriched uranium" is a permissible "excise" tax (App., *infra*, 19a). The court offered two theories for that holding, both of which conflict with the decisions of this Court.

(i) First, the court suggested that the EPACT tax could be sustained as an excise simply because it falls on an item of property (government-enriched uranium) that could be characterized as a "consumable." There is no support for the proposition that a proscribed "direct tax" imposed "merely on the ownership" of personal property is to be treated as a permissible "excise" if that property is capable of being consumed. To the contrary, this Court has clearly held that "[t]o levy a tax by reason of ownership of property is to tax the property" and that a tax that applies to the ownership of consumable property (such as whiskey held in inventory) cannot be made into an indirect excise "tax by calling it so." *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. at 294. See also *Schenley Distilleries, Inc.* v. *United States*, 255 F.2d at 337 (a tax on the *manufacture* of whiskey is "a permissible type of excise" for it is levied "on more than the bare ownership of property").

In support of its theory that a tax on the ownership of a "consumable" is necessarily an excise, the court below again

incorrectly sought to rely on the *Hylton* case (App., *infra*, 20a). This Court has explained that *Hylton* stands for the entirely different proposition that a tax on the "use" of property, or on "the exercise of a single power over property incidental to ownership, is an excise." *Bromley* v. *McCaughn*, 280 U.S. at 136. In contrast, "a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property" is a direct tax. *Id.* at 137. See note 10, *supra*.

The court below also erred in citing *Patton* v. *Brady*, 184 U.S. 608, 617 (1902), for the proposition that a tax on the ownership of consumables is an "excise" (App., *infra*, 20a). That case merely applied the settled principle that a tax on the manufacture and sale of a good is an excise tax. A sales tax, which is perhaps the most common excise tax, is levied on the *transfer* or *sale* of property, not on its mere ownership. Indeed, in *Patton*, this Court emphasized this distinction between an excise tax on sales of property and a direct tax imposed on such property "as property," for which the separate "constitutional limitations as to the mode of taxing property" apply. 184 U.S. at 622. The court of appeals plainly erred in failing to honor that distinction in this case.

(ii) The court of appeals also erred in stating that the EPACT tax could be treated as an excise on the theory that it is imposed on "the purchase" or "acquisition" of enriched uranium "as opposed to the mere ownership of property" (App., *infra*, 22a). That description of the tax is simply wrong. The EPACT tax is not imposed as a "sales" tax on purchases of enriched uranium, for it does not apply to *any* sale (much less to *all* sales) of such materials. Instead, it applies by its express terms only to the utilities that *owned* government-enriched uranium materials on the assessment

date of October 24, 1992.[15] The obvious character of any direct tax assessed "merely by reason of ownership" is that it is assessed on individuals who (at some earlier time) acquired such property and who (as of the assessment date) still own it. As explained above, the EPACT tax applies precisely and exclusively in that manner. See note 5, *supra*. And, as this Court stated in rejecting a similar effort to relabel exactions in *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. at 294, a direct tax imposed on property "by reason of ownership" cannot be made into an indirect tax "by calling it so."

Unlike an excise tax, the EPACT does not apply to any transfer, sale or use of property. Instead, as the court below ultimately appears to acknowledge, the tax "here [is] on the ownership" of "a particular kind of personal property" on the assessment date (App., *infra*, 20a, 24a). As this Court held in *Fernandez* v. *Wiener*, 326 U.S. at 352, 362, while an "excise" may be levied "upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property," an excise does *not* include a tax that falls on the owner "merely because he is owner." The extraordinary assertion of the court of appeals at the conclusion of its opinion that a permissible "excise" includes a tax imposed on the "ownership" of a particular kind of property (App., *infra*, 24a) manifestly conflicts with the decisions of this Court and the other courts of appeals.

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[15] If the utility that purchased enriched uranium sold it to another utility before October 24, 1992, the first purchaser pays no tax; only the owner of the property on the assessment date of October 24, 1992, pays the tax. See note 5, *supra*. Like an ordinary property tax, the EPACT is imposed annually based on the ownership of the property on a specific date (*ibid.*), whereas an excise or sales tax applies to specific transfers or uses of the property. See *Bromley* v. *McCaughn*, 280 U.S. at 136; note 11, *supra*.

3. Because the Federal Circuit has a special status in the adjudication of monetary claims involving the United States, this Court has often noted the need for plenary review of decisions of that circuit of significant fiscal importance. See, *e.g.*, *United States* v. *IBM Corp.*, 533 U.S. at 846; *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). In light of the important constitutional issues presented by the decision below, and the enormous magnitude (and extreme retroactivity) of the direct federal property tax involved in this case, such review is appropriate in this case.

a. The decision below would drastically alter the constitutional limitations on the federal taxing power. This Court has held that the fundamental constitutional restrictions on the federal taxing power contained in the "direct tax" clauses of Article I proscribe an unapportioned direct federal tax "on the ownership of property." By permitting a direct federal property tax on the ownership of a "particular kind of personal property" (App., *infra*, 19a), the decision below represents more than an incidental erosion of these constitutional principles. It is instead a rejection and nullification of them.

This nullification of constitutional principles interferes with the traditional State authority over property taxation that the Constitution seeks to protect. It also cedes to Congress a new taxing power that the Founders deliberately and expressly sought to restrain. In Article I, Section 9 of the Constitution, the Founders adopted three separate restrictions on the federal taxing power -- the direct tax clause, the export clause and the port preference clause. U.S. Const. Art. I, §9, cls. 4, 5, 6. The central purpose of these constitutional restrictions on federal taxation is to protect State sovereignty over traditional methods of raising revenue and to "diffus[e]

sectional conflicts" that might result from federal intrusion into that domain. *United States* v. *IBM Corp.*, 517 U.S. at 860. "The founders anticipated that the expenditures of the States, their counties, cities and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes." *Pollock*, 158 U.S. at 621. The restrictions of the "direct tax" clause were adopted "in order that the power of direct taxation by the general government should not be exercised, except on necessity * * * ." *Ibid.*

The concern of the Founders that a direct federal tax on the ownership of property could inflate sectional rivalries related to the possibility that a direct tax might be imposed on only one particular kind of property (such as tobacco, pineapples or real estate) that happened to be more prevalent in some regions of the Nation than in others. Such a tax would obviously disadvantage the States that possessed such property in relative abundance, and the direct tax clauses were designed to prevent such a tax from being imposed "unfairly and discriminatingly" to the disadvantage of particular States. *Pollock*, 158 U.S. at 621; E. Jensen, supra, 97 Colum. L. Rev. at 2387.[16] The holding of the court below that a "direct tax" does *not* include a federal tax imposed on the ownership of a "particular kind" of property (App., *infra*, 19a) would thus squarely defeat the central objectives of these constitutional provisions.

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[16] Indeed, at the hearings that led to the enactment of the EPACT assessment, a Representative from a State that was "heavily dependent on nuclear energy" objected to the EPACT tax as "terribly unfair" because "those States that are more nuclear dependent will bear a much heavier burden of this tax." Hearings Before the House Committee on Ways and Means on the Comprehensive National Energy Policy Act, 102d Cong., 2d Sess. 79 (Apr. 28, 1992) (Serial 102-94).

b. This Court has repeatedly rejected "policy" arguments proffered by the federal government as justifications for evading the textual limitations on the federal taxing power in the Constitution. See *United States* v. *IBM Corp.*, 517 U.S. at 861. There is, in any event, no need to resort to "policy" discussions to resolve the issues presented in this case. There is no doubt that Congress *has* the power to remedy the pollution that the government caused at its uranium enrichment facilities. There is also no doubt that, through some *lawful* measure that does not abridge constitutional proscriptions, Congress could raise funds for that purpose. But this Court's decisions make clear that -- no matter how worthy the purpose -- Congress may not fund the costs of its programs through the imposition of unconstitutional taxes. *United States* v. *IBM Corp.*, 517 U.S. at 861. See also *United States* v. *United States Shoe Corp.*, 523 U.S. at 370; note 6, *supra*. That, however, is precisely the course taken by Congress in the EPACT.

Because the decision of the court of appeals conflicts with the decisions of this Court and other courts of appeals and, in doing so, broadly sanctions the imposition of unconstitutional federal property taxes that have an enormous fiscal effect, review of this unprecedented decision is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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